No. 3579.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Charles L. Williams,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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I.

STATEMENT OF THE CASE.

Charles L. Williams was for many years cashier, vice-president and manager of the American National Bank of San Diego. That bank was consolidated with the First National Bank of San Diego about January 1, 1918, and Williams was elected president of the First National at that time. The trouble about William's transactions developed on February 12, 1918, and he resigned February 15, 1918 and the resignation was accepted about March 15, 1918. Two indictments were returned against Williams, the second one, containing thirty-seven counts, to correct irregularities

in the first. He was twice tried on the last indictment. The first resulted in a mistrial. On the second he was placed on trial on the following counts of the second indictment: 2, 3, 4, 5, 7, 9, 10, 12, 13 ,14, 16, 17, 19, 21, 22, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, and 37; total, 27.

He was not placed on trial on counts 1, 8, 11, 15, 18, 20, 23, 24, 25 and 32—ten.

The trial resulted in acquittal on counts 4, 5, 6 and 7 —four; disagreement on 2, 3 ,9, 10, 12, 13, 14, 26, 27, 28, 29, 30, 36 and 37—fourteen; and conviction on 16, 17, 19, 21, 22, 31, 33, 34 and 35—nine.

The judgment of the court from which the appeal is taken was upon counts 16, charging a false entry in the time account ledger sheet to deceive agent of comptroller; 17, false entry in report of condition of bank to deceive comptroller; 19, embezzlement of $20,000 and 21, false entry in collection register to deceive comptroller.

These four charges grew out of the M. B. Murphy transaction. Murphy deposited $26,500 in a time account. Williams entered that sum in his pass-book. He then caused the entry on the bank's books as $6,500, by making out a deposit slip in Murphy's name for that amount. He caused a long overdue and worthless note for $20,000 to be placed on the bank's collection register as the property of Mr. Murphy to represent the balance of the deposit. Murphy knew nothing of this manipulation. The First National Bank had

to make this $20,000 good to Murphy, and paid him the money.

Count 22, charges a false entry on the bank's report to the comptroller. This grew out of the Agnes Gillen matter. Mrs. Gillen had an inactive account which, in the course of years, had grown to more than $10,000. Williams drew ten thousand dollars out of this account and so manipulated her pass-book, making most of the entries with his own hand, that Mrs. Gillen was unaware of the withdrawal. The pass-book showed the deposit correctly but the books of the bank showed $10,000 less than the pass-book, and the report reflected this deception.

Count 31 charges misapplication to deceive examining agent of the comptroller. It grew out of the Fidelity Construction Company matter. This company had on deposit with the bank a large sum of money. The bank held a large amount of old notes of doubtful value and the comptroller of the currency was urging that they be disposed of. The call for a report of condition was at hand. Williams drew a check on the construction company's account for $46,219.10, signed the company's name to it "By C. L. Williams V. Pt." and withdrew from the banks that amount in the questionable notes. Williams was not, at that time, an officer of the company and had no authority whatever to draw this check, and the company's officers did not know the same had been drawn until months afterward.

Count 33 charges the abstraction from the credits of the bank of certain of the notes taken up by the $46,219.10 check to deceive the bank examiner.

Count 34 charges embezzlement of $2,000. This grew out of one Russell Williams transaction. Russell Williams deposited $2,000 with C. L. Williams as a bank official to be invested in a note. C. L. Williams deposited the $2,000 in his own personal account and checked it out in small sums until his account was exhausted.

Count 35 charges embezzlement of $3,000. The same Russell Williams after depositing the $2,000 some time, deposited $3,000 with C. L. Williams, as a bank official, to be loaned. C. L. Williams gave Russell Williams receipts for this money and deposited the money in his own account and checked it out as before.

It must be plain that prejudicial error was not committed in regard to the counts upon which Williams was acquitted. It is also clear that no prejudicial error cognizable by this court was committed on the trial of the fourteen counts upon which the jury disagreed. The disagreement cured all errors as to them. A new trial can be had.

There is no good accomplished by encumbering the record with statements and arguments about matters that the court will not consider. We will then dismiss without further attention all arguments on counts other than those upon which conviction was secured.

II.

Was the Indictment Subject to Be Quashed Because the Grand Jury Was Not Properly Drawn?

No. The evidence introduced by defendant on his motion to quash, including his own withdrawal of his objection "3rd" (brief pp. 3, 11, 12 to 19) showed without question that every formality in regard to the selection and empanelment of the grand jury had been observed and that competent testimony was introduced before the grand jury upon which to found the indictment. But, aside from this fact, the cases universally hold that a motion to quash on this ground is bad unless there is a showing of prejudice to defendant, and no prejudice is here claimed.

U. S. v. Chiares, 40 Fed. 820;
Agnew v. U. S., 165 36, 42, 44, 41 L. ed. 624, 627;
Ruthenberg v. U. S., 245 U. S. 482.

The record discloses that Judge Bledsoe had directed the clerk and jury commissioner in regard to the drawing of the jury, just as directed in section 277 of the Revised Statutes of the United States.

The testimony of the clerk, in the record, shows that when the grand jury was drawn more than three hundred names were in the box.

It is very difficult to understand why counsel continues to urge these objections when each and every

of them have been met by the evidence contained in this record and it is proven that every proceeding was regular and in compliance with the law.

The sections of the Federal Judicial Code controlling drawing and impanelment of grand juries are sections 275, 276, 277, 279, 282, 283 and 284.

State laws do not control empaneling of juries in U. S. courts except as to qualifications.

U. S. v. Reed, 27 Fed. Cas. No. 16, 134, 2 Blatchf. 435 5 Fed. Stat. Anno. (2d Ed.) 1066-7.

In enacting this statute (Federal Judicial Code, Sec. 284) Congress had no intent to legislate as to the validity of indictments. The purpose was merely to prevent the expense of having a grand jury unnecessarily summoned.

In U. S. v. Reed, 2 Blatchf. 435, 27 Fed. Cas. 727, 733, Mr. Justice Nelson held that a verbal order from the judge to the clerk to issue *venire facias* for a grand jury was sufficient. In Fries case, What. St. Tr. 453, 3 Dall 515, 9 Fed. Cas. 826, 923, Mr. Justice Iredell observed that a venire issued with the sanction of the court has the same effect as though the express order of the court had been annexed.

Breese v. U. S., 203 Fed. 824, 828.

Such order (to draw a grand jury) does not determine anything with reference to any adversary proceeding in the court, or conclude public or private

rights in any way, and amounts to nothing more than a mere administrative regulation of internal affairs relating to the order of the court,—if the grand jury be drawn by unauthorized persons, or from persons not properly selected or qualified and the like, he has his remedy by motion to quash the indictment when he is called to answer it.

Ex parte Harlan, 180 Fed. 119, 127 to 129.

A grand jury drawn by the proper authority and composed of qualified persons is authorized to sit, unless the court of which it forms a part is holding a session at an unauthorized time or place.

Ex parte Harlan, 180 Fed. 119.

The presumption, until the contrary appears, is that the grand jury acted upon legal evidence, and the burden rests on him who asserts that it did not, to prove it.

Ex parte Harlan, 180 Fed. 119.

The court will not hear evidence, on motion to quash, to determine the sufficiency of the evidence submitted to a grand jury to justify the return of an indictment.

U. S. v. Cobban, 127 Fed. 713, 718-723;
Chadwick v. U. S., 141 Fed. 225;
U. S. v. Swift, 186 Fed. 1002;
Hillman v. U. S., 192 Fed. 264, 267;
McKinney v. U. S., 199 Fed. 25, 27;
U. S. v. Nevin, 199 Fed. 831, 836;
U. S. vv. Rintelen, 235 Fed. 787;

U. S. v. Perlanan, 247 Fed. 158, 162;
Holt v. U. S., 218 U. S. 245;
U. S. v. Silverthorne, 265 Fed. 859.

Plea in abatement must be exact and specific. It is not sufficient to allege that the names of certain persons were placed in the jury box by a deputy clerk and that mover does not know whether any of these names were drawn. The motion must affirmatively show that some of such names were drawn.

U. S. v. Rockefeller, 221 Fed. 462, 466;
U. S. v. Silverthorne, 265 Fed. 859.

A motion to quash is addressed to the sound discretion of the court, and if refused, is not a proper subject of exception.

When made in behalf of defendants, it is usually refused, unless in the clearest cases, * * *.

U. S. v. Rosenburg, 74 U. S. (7 Wall.) 580, 583.

The defendant has shown no possible prejudice to his interest in the grand jury proceedings, and the court found none. The evidence submitted disproved every claim of irregularity in drawing and empaneling the grand jury and in the presenting of evidence to the grand jury. The contention of defendant is without merit.

III.

The Demurrer.

Counsel presents and argues the demurrer to various counts upon which no conviction was had. He has no appeal from these rulings. The rulings upon such counts is not a final judgment within the meaning of section 128 of the Judicial Code, and no appeal lies therefrom. We will spend no time upon such parts of the appellant's brief.

1. An indictment charging misapplication of the "moneys, funds and credits" of a bank is not duplicitous as charging three offenses, where such allegation is followed by the additional words "a more particular description of which is to the grand jurors unknown." Same rule applies to embezzlement, or abstraction of "moneys, funds and credits."

Sheridan v. U. S. Fed. 305, 310;
Breese v. U. S. 106 Fed. 680, 688;
U. S. v. Hinze, 161 Fed. 425, 429;
U. S. v. Voorhees, 9 Fed. 143;
Evans v. U. S., 153 U. S. 584;
Shepard v. U. S., 236 Fed. 73, 81.

In brief, page 20, 11.9 to 17, it is said:

"Nowhere in any of the counts, is there any allegation as to what property was embezzled, or what property misapplied, or what property was abstracted, etc."

A reading of the indictment disproves this charge *in toto*.

Count 19 charges embezzlement of the "moneys, funds and credits" of the bank "to the amount and value of $20,000, a more particular description of which said moneys, funds and credits is to the grand jurors unknown."

Count 31 charges misapplication of "moneys, funds and credits" of the bank "to the amount and value of $46,249.10" "a more particular description of which said moneys, funds and credits is to the grand jurors unknown."

Count 33 charges abstraction "from the credits of the said National Banking Association certain notes, then and there belonging to the said National Banking Association, which said notes were of the tenor following, to-wit:" Here follows the date, signatures and amount of each of fourteen different notes. Each of these counts sets up the means by which the act charged was accomplished.

Count 34 charges embezzlement of "moneys, funds and credits" "to the amount and of the value of" $2,000 "a more particular description of which said moneys, funds and credits is to the grand jurors unknown."

Count 35 charges embezzlement, in the same terms, of $3000 in value of the moneys, funds and credits.

Counts 16, 17, 21 and 22, the remainder of those upon which convictions were had, charge false entries.

2. It is said the indictment is defective because it is not alleged in counts setting up abstraction, that

such abstraction was without the consent of the bank or the directors.

The case of U. S. v. Northway, 120 U. S. 327, 30 L. ed. 664, cited in brief, does not sustain this view. That indictment alleged want of consent and it was held good. It is not held to be essential.

In the case of U. S. v. Britton, 107 U. S. 655, 27 L. ed. 520, cited in brief, the indictment charges misapplication, not abstraction.

A careful reading of section 5209 is an answer to this contention. It provides:

> "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association:"

Then follows the acts denounced if done without the authority of the directors. In other words, if the directors should consent that the moneys, funds or credits of the bank might be embezzled, abstracted or wilfully misapplied, they would be guilty of aiding and abetting the offense instead of affording a defense to the criminal.

In the case of Sheridan v. U. S., 236 Fed. 305, 311, the court says:

> "Nor was it necessary to allege that the money was abstracted without the consent or knowledge of the depositor. If in fact it was abstracted with such consent and knowledge, it was a matter of defense to be shown by the plaintiff in error."

In Flickinger v. U. S., 150 Fed. 1, 3, the court says:

"The statute does not make it necessary, in order to constitute an offense, for the president to make the wilful misapplication 'without authority from the directors,' although there is that special provision with respect to the unlawful issue of any of the notes of the association, or of any certificates of deposit or bill of exchange, etc. In passing upon the demurrer, the court below said:

" 'Objection is made that there is no averment that Hays discounted this paper without the knowledge and consent of the board of directors. I do not think this averment necessary, and it would not be less criminal done with the knowledge and consent of the board of directors, if the defendants and the board of directors did it under the circumstances which the indictment avers existed in connection with the action of the defendants. It appears, from the averments of these counts that the defendant Hays misapplied money and funds of the bank by discounting these notes.'

We concur in this view. The averments of these counts show, in each instance, a wilful misapplication of the funds of the bank, for an unlawful purpose, with intent to injure and defraud the bank. The transaction in each case is described in detail, and the averments, covering every element of the crime, are full and clear. There could be no proper presumption that the directors, in the ordinary course of business, would consent to the discount by the president of worthless and fictitious paper, with intent to injure and defraud

> the bank, and therefore no necessity to insert in the indictment an averment to negative such authority. If, under any circumstances, the authority of the directors, could validate such conduct on the part of the president then, in that event, which we see no reason to anticipate, the rule laid down by this court in the McKnight case would apply. It would be a matter of defense. McKnight v. U. S., 115 Fed. 972, 986, 54 C. C. A. 358."

That opinion holds as does the opinion of the Circuit Court of Appeals for the Sixth Circuit, in McKnight v. U. S., 115 Fed. 972, that if under any circumstances the authority of the directors validates such conduct, it would be a matter of defense. The McKnight opinion was rendered by Circuit Judges Lurton, Day and Severans, the opinion being written by Circuit Judge Day, afterwards judge of the Supreme Court of the United States, and on page 984, paragraph marked four, Judge Day takes up the Britton case and shows clearly that the Britton case is not in accord with the later cases by the Supreme Court, particularly the case of Claasen v. U. S., 142 U. S. 140, and Devons v. U. S., 133 U. S. 584. It is true, as said by the district judge in the Martindale case, that the indictment in the McKnight case charges that the misapplication was without the consent of the board of directors, and without the consent or knowledge of the discount committee, but Judge Day in the McKnight case holds that that allegation in the indictment was unnecessary,

and that the allegation need not be approved. Judge Day in his opinion cites the case of the United States v. Eno. 56 Fed. page 218, by the District Court of the Southern District of New York, in which Judge Benedict, at page 220, said:

> "It may be proper to add, in regard to the point made that the indictment is defective because it fails to aver that the acts charged were done without the knowledge or assent of the directors of the association, that, in my opinion, such an averment is not essential in an indictment for the misapplication of the funds of a national bank. The statute does not make absence of authority from the directors an ingredient in the crime of misapplication. I conceive that a conversion of the funds of a national bank by its president may be a criminal misapplication of the funds of the bank, although done with the knowledge and assent of the directors of the bank. The president of a national bank is not the association, nor are the president and directors the association. They are only officers of the association. The moneys of the stockholders and of the depositors in the association are not the moneys of these officers, but of the association; and it has not yet been held that a national bank may be pillaged of such moneys by its president with impunity, provided the act be done in pursuance of a conspiracy between the president and the directors, or a majority of them."

In the still later case of Stouts v. U. S., by the Circuit Court of Appeals for the Eighth Circuit, Cir-

cuit Judge Hook, in passing upon a question of this kind, involving the misapplication of the funds of the bank by loaning of money upon notes that were not well secured, at the top of page 803, states:

> "The indictment was framed and the case was tried as though the knowledge and approval of the directors would be a defense. As to this see Flickinger v. U. S., 150 Fed. page 1."

The exact question here involved and the effect of the ruling in the Britton case were very fully and carefully considered by District Judge Hough in the case of the United States v. Morse, 161 Fed., page 429. The Morse indictment contained, among others, nine counts charging misapplication. The misapplication, as charged, was a like misapplication as that charged in the indictment under consideration, and on page 435, in considering this question, Judge Hough says:

> "United States v. Martindale (D. C.), 146 Fed. 280, declares it a fatal objection not to negative the knowledge and approval of the governing authority of the bank. This is not consistent with Evans' Case, 153 U. S. 593, 14 Sup. Ct. 934, 38 L. Ed. 830.
>
> "On principle these defendants could not have possessed authority to produce or permit a conversion of the funds of the bank to Morse's use. Authority to commit a crime is an impossibility, yet nothing short of that power meets the exigencies of defendant's case if the allegations of the count are true as pleaded. It cannot be necessary

to negative a legal impossibility. To assert, as does this count, that the payment for the contemporaneous benefit of Morse was wilfully made, with intent that Morse should convert the same to his own use, without securing repayment, and with intent to defraud, does clearly aver a conversion of the funds, effected as soon as the bank paid over the money."

It is to be noted that the present indictment charges that Williams not only "with intent to injure and defraud said Banking Association," but also "divers other persons whose names are to the grand jurors unknown and who were then and there shareholders and creditors and depositors of said Banking Association, did wilfully misapply said moneys, etc." This seems to bring the present indictment clearly within the reasoning of the Morse case.

It therefore seems clear that if the proper proof shows, as the indictment charges, a wilful abstraction by the withdrawing of certain notes, as described in the abstraction counts, which notes were, as charged, applied to the use and benefit of persons other than the Banking Association, and the said notes, as is charged, were then and there wholly lost to the Banking Association or by such withdrawal the comptroller or his agent was deceived, and all of that was done, as charged in the indictment, with intent not only to injure and defraud the Banking Association, but the shareholders, creditors and depositors of said Banking Association, or with intent to deceive the comptroller

or his agent, the board of directors could not consent to such fraud upon the shareholders, creditors, and depositors and the comptroller or his agent. If they did so consent, then instead of taking from the transaction criminal liability on the part of the officer, all of those, including the directors themselves, who knowingly participated in such misapplication would be equally guilty. It must be remembered, as said by Judge Benedict in the Eno case,

> "the directors are not the Banking Association * * * The money of the stockholders and depositors is not the money of these officers."

If this were not true, then a board of four or five directors could misapply the moneys of the bank with impunity with intent to injure and defraud the shareholders, creditors and depositors and be able to say, "We are not criminally liable for any misapplication, even though we did these things with the intent as charged, because *we* consented thereto."

In the Evans case the Supreme Court fails to follow the rule laid down in the Brittan case on this point. On page 592 of the Evans opinion, last paragraph, the Supreme Court says:

> "It is objected, however, to this count that there was no averment that the cashier, in discounting the note, acted in excess of his powers or outside of his regular duties, nor was there any averment that the cashier was not the duly authorized officer of the bank to discount paper, nor was there any averment that the discount was

procured by any fraudulent means, or that Evans was at the time of such discount insolvent, or knew himself to be so. It was held by this court in Bank of the United States v. Dunn, 6 Pet. 51, that the power to discount paper was not one of the implied powers of the cashier, and this is believed to be the law at the present day. Morse on Banking, Sec. 117. If the directors of this bank had authorized their cashier, either generally or in this particular case, to discount paper, it was clearly matter of defence. But even if he did possess such power, and wilfully abused it by discounting notes which he knew to be worthless, and did this with deliberate intent to defraud the bank, it is not perceived that his criminality is any less than it would have been if he had acted beyond the scope of his authority."

This is in accord with a very able opinion by Justice Story of the Supreme Court in 26 U. S. page 44. On page 71 of that opinion Justice Story says:

"The instruction prayed for, proceeds upon the same principle, as the pleas. It supposes, that the usage and practice of the cashier, under the sanction of the board, could justify a known misapplication of the funds of the bank. What is that usage and practice, as put in the case? It is a usage to allow customers to overdraw, and to have their checks and notes charged up, without present funds in the bank—stripped of all technical disguise, the usage and practice, thus attempted to be sanctioned, is a usage and practice to misapply the funds of the bank; and to connive at the with-

drawal of the same, without any security, in favor of certain privileged persons. Such a usage and practice is surely a manifest departure from the duty, both of the directors and the cashier, as cannot receive any countenance in the court of justice. It could not be supported by any vote of the directors, however formal; and therefore, whenever done by the cashier, is at his own peril, and upon the responsibility of himself and his sureties. It is anything but 'well and truly executing his duties, as cashier.' This view of the matter disposes of this embarrassing point, and also of the second instruction prayed for by the defendants; which substantially turns upon the like considerations."

Again in Breese v. United States, 106 Fed. 680, at page 685, the court says:

"The requests numbered 9 and 10 were to the effect that if the acts charged against the defendant were permitted and sanctioned by the other officers of this bank, whose duty it was to supervise, manage, and control such matters, defendant could not be found guilty; these officers having the right, in the exercise of their official discretion, to sanction, ratify, and confirm said acts. These were properly refused. Evidence had been submitted to the jury of the acts charged. With this was evidence intended to show the intent with which the acts were done. A part of this evidence was that the defendant, with two of the other directors,—making three out of four, the whole number of directors,—had been engaged in obtaining money from the bank on wholly

worthless securities. Surely, evidence that the defendant acted with the sanction, consent, or ratification of these men could not be admissible. Apart from this, the language of the requests is broad enough to mean that, however fraudulent and illegal the acts of the defendant were, if they were permitted, sanctioned, or ratified by the other officers of the bank, they were not unlawful, a startling proposition. The most formal vote of the board of directors could not authorize the embezzlement, abstraction, or wilful misapplication of the funds of the bank. Minor v. Bank, 1 Pet. 44, 7 L. Ed. 47. The authority of the officers of the bank and of its board of directors extends only to legitimate transactions honestly intended for the benefit of the bank. U. S. v. Harper (C. C.), 35 Fed. 484."

Section 5209, after stating various forbidden acts, thus proceeds:

"* * *, *with intent, in either case*, to injure or defraud the association or any other company, body politic or corporate, or any individual person, *or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association*."

The reason for this provision is plain. There could be no governmental supervision if the officers of the bank were left free to withdraw objectionable paper to prevent the comptroller of the treasury from discovering it as a part of the assets. Hence it is made a crime to abstract moneys, funds and credits "with

intent—to deceive—any agent appointed to examine the affairs of any such association."

The indictment is well within the provisions of section 1025, Revised Statutes.

There was no error in overruling the demurrer.

IV.

Motion to Require Election.

The rule of law with relation to the requiring of the prosecution to elect upon which count it will proceed is exactly the reverse of what is urged by counsel.

> "The right of demanding an election and the limitation of the prosecution to one offense is confined to charges alleged in the indictment, *which are actually distinct from each other, and do not form parts of one and the same transaction.* * * * An indictment will not be quashed, nor will the prosecutor be put to his election as to which count he will proceed under, when the court may be doubtful if the intention be not to charge the same as cognate offenses growing out of the same transaction, but will postpone action *until it is developed by the evidence that it is sought to convict of two or more offenses growing out of separate and different transactions,* before compelling the state to elect on which count the prosecution will proceed."
>
> Hughes' Criminal Law, Sec. 2784, p. 722;
>
> U. S. v. Nye, 4 Fed. 888, 893;
>
> Toy v. U. S., 266 Fed. 326.

Such motion is always addressed to the sound discretion of the court.

U. S. v. Nye, 4 Fed. 888, 893;
Painter v. U. S., 151 U. S. 396, 400, 38 L. ed. 211.

One act may be a violation of two statutes and if each statute requires proof of an additional fact that the other does not, an acquittal or conviction under either statute does not exempt defendant from prosecution and punishment under the other.

U. S. v. Turner, 266 Fed. 248, 250;
Gavieres v. U. S. 220 U. S. 338, 55 L. ed. 489;
Bens v. U. S. 266 Fed. 152.

This procedure has been modified by section 1024 U. S. Revised Statutes, which reads:

> "When there are several charges against any person *for the same act or transaction,* or for two or more acts or transactions connected together, or for two or more acts or transactions of the some class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

See:

Freed v. U. S., 266 Fed. 1012, 1014.

The court, in the case at bar, exercised a sound discretion in refusing to compel the election and defendant was not prejudiced thereby.

V.

Asserted Errors in Rulings on Evidence.

1. (Brief p. 27, ll. 10 to 21.) This evidence was upon counts Nos. 4, 5, 6 and 7. Appellant was acquitted on all these counts. No prejudicial error could accrue to appellant even if there was error. The inquiry was directed to the fact that a note was executed to the bank by T. C. Hammond, assistant cashier, at the request of appellant. Hammond got nothing for the note, but Williams executed to him his personal note for indemnity. The Hammond note was carried on the books of the bank as a loan. It was attempted to explain the false entries by saying the bank used the money to pay interest on some of its obligations. The evidence elicited went to the intent of appellant to deceive the bank examiner by the false entry. The ruling was right.

2. The brief of appellant, from page 27, line 10 to page 37, line 24, sets out various assignments of error based upon the rulings of the court on admissibility of testimony. There is no presentation of law, or argument, or reason for assigning the errors. The count of the indictment to which the evidence was introduced is not stated, the issue to which the evidence was addressed is not given, and no showing is made from which it can be known whether the rulings were proper or improper. Upon this trial appellant was acquitted upon four counts, convicted on nine counts and there was disagreement upon fourteen counts.

Where defendants were convicted on several counts, and the judgment was warranted by any one of several such counts, error, if any in admitting or excluding evidence relating to one count alone, is immaterial, and not ground for reversal.

Wesoky v. U. S., 175 Fed. 333;
Goll v. U. S., 151 Fed. 412.

Counsel cannot impose upon the court the duty of digging through the transcript in search of a possible error. Neither is it the duty of the United States attorney to try and guess what reason counsel had in mind, or now has in mind, for claiming the rulings of the court to be erroneous. We affirm that there is no error in this record. The presumption is that there is no error. No error is made to appear by appellant. It is not pointed out or shown where, or in what appellant was prejudiced by any ruling set out. Therefore the court will disregard the claimed errors.

The testimony introduced to show that the First National Bank made good the defalcations of appellant was restricted by the court to the single proposition that the bank suffered loss by the various transactions to which the evidence related. The jury was specially instructed by the court to this effect.

It is evident that the jury did not believe the testimony of defendant that he merely changed the places of the Goodbody note and the Murphy cash, giving the bank the cash. If they did so believe, the testimony that the bank returned the money to Murphy's

account would not have induced them to find appellant guilty of embezzlement. It would merely have shown that the bank had made good and returned the money Williams had filched from Murphy's account for the use of the bank. [Br. p. 37, l. 27 to p. 38, l. 25.)

VI.

The Instructions.

1. (Br. p. 38, l. 26 to p. 39, l. 33.) The mistake of counsel as to this portion of the instructions is found at page 39, ll. 26-33, as follows:

"Such an instruction does not accurately state the law, and is misleading, because it attempts to take away from the jury that which the law directs them to do, to-wit—determine, from the evidence, what particular count he is guilty of, and when they so find that he is guilty of one particular count, in connection with a group of counts carved out of the same transaction, that they then have made their selection, and cannot find him guilty of the other counts which deal with the same transaction;"

Of course this is not, and cannot be the law. Take, for instance, counts 16, 17, 19 and 21 which all grew out of the Murphy transaction. The act was not "carved up into various charges." Count 16 charges that a false entry was made in the "time account, ledger sheet, account number 1436, M. B. Murphy" on May 5, 1916, by entering thereon $6,500 instead of $26,500 which was the correct amount, to deceive the comptroller.

Count 17 charges that on June 30, 1916, a report of the condition of the bank was made and transmitted to the comptroller and under the head of "other time deposits" under liabilities, a false entry was made showing $20,000 less than it should have been, this being based on the crediting to the Murphy account $20,000 less than it should have been.

Count 19 charges the embezzlement of the $20,000 on May 5, 1916.

Count 21 charges a false entry May 5, 1916, in the "collection register," to deceive agent of comptroller, of the M. D. Goodbody note for $20,000 to be left for collection by M. B. Murphy.

While each of these charges arose out of one transaction, there cannot be said to be a chance for an election, or selection as to which of the various offenses were committed. It is entirely consistent that each was committed. They are separate and distinct. No error appears in this instruction.

See:

Gavieres v. U. S., 220 U. S. 338, *supra;*
Bens v. U. S. 266 Fed. 152, *supra;*
U. S. v. Turner, 266 Fed. 248, 250, *supra.*

2. (Br. p. 40, ll. 1 to 18.) The court did fully instruct the jury in regard to the presumption of innocence. The instructions given were full, and fair to defendant. It was not necessary for the court to modify every phrase of his instructions by referring to the presumption of innocence. Besides, the very

terms of the last sentence quoted would call for evidence which would overcome the presumption of innocence. I take this language to mean the overcoming not only of the presumption of innocence, but of every reasonable doubt, to-wit:

"Where the evidence is entirely circumstantial, *and yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion,* the law makes it the duty of the jury to convict."

Counsel's proposition to instruct the jury that the circumstantial evidence must not only be sufficient "to be inconsistent with any other rational *theory of innocence*" but must also be "sufficiently strong to set aside the presumption of innocence, and moreover to remove it beyond a reasonable doubt, *and that it was not inconsistent with any rational theory of innocence* they were bound to acquit him," seems to be founded on the theory that defendant was being tried to determine if he was innocent. Such was not the case. He was duly charged with being guilty. The jury were impanelled to determine whether or not he could be proved guilty, not whether he could be proved innocent. In the eyes of the law he was innocent until the jury determined him guilty from the evidence.

> "It was erroneous to give a charge which authorized an acquittal on a reasonable doubt of innocence instead of a reasonable doubt of guilt."
>
> 16 C. J. 993, Sec. 2401.

3. (Br. p. 40, ll. 19 to 23.) This is merely a mode of stating the doctrine of reasonable doubt and is in line with the authorities.

4. (Br. p. 40, ll. 25 to 31.) It is an extraordinary misconception of the language of the instruction which enables counsel to assert that the court therein stated that the "transactions mentioned in the indictment" had been "actually proved against" defendant. On other other hand the only rational construction of the language here is that the court was instructing the jury that the only purpose of the introduction of evidence of offenses other than those charged in the indictment was to show the intent of defendant, and this was to be applied only to such matters charged in the indictment as the jurors found had been proven. No error appears.

5. (Br. p. 41, ll. 11 to 23.) It is not according to the record, nor the fact that the court permitted evidence that certain amounts were charged to the profit and loss account of the bank as a circumstance for the jury to consider in determining whether appellant had been guilty of embezzlement or misapplication, or abstraction. The court told the jury when the evidence was offered and admitted just what he told them in this instruction, that this evidence was to be considered only to determine whether or not the bank's funds had been depleted. The ridiculous charge that the court thereby told the jury that such act by the bank was sufficient to justify the jury in coming

to the conclusion that plaintiff in error was responsible for such depletion is, of course, totally unsupported by the record. The evidence introduced as to each of the various transactions, before the introduction of the evidence to show the depletion, proved beyond any doubt that appellant was the only person responsible for the condition requiring restitution by the bank.

6. (Br. p. 42, l. 17 to p. 43, l. 33.) See authorities above cited under No. 1 of "demurrer," as to the matter of charging embezzlement, etc., of "moneys, funds and credits." The law does not make the value of the property any element of the offense and hence the proof of the value is immaterial.

7. (Br. p. 44, l. 1 to p. 45, l. 13.) We have met this position, *supra*. The statute specifically lays down that the offense is committed if defendant does the prohibited act "with intent * * * to deceive * * * any agent appointed to examine the affairs, etc."

8. (Br. p. 45, l. 15 to p. 46, l. 2.) The jury recalled the evidence which proved beyond a reasonable doubt that defendant had misapplied funds of bank. They convicted on counts 31 and 33.

9. (Br. p. 46, ll. 3 to 19.) Same as No. 7, *supra*.

10. (Br. p. 46, l. 20 to p. 48, l. 17.) The instruction correctly sets forth the law with regard to intent in such cases.

The intent to injure or defraud the bank within the meaning of the section does not necessarily involve malice or ill-will toward the bank, for the law pre-

sumes that a person intends the necessary and natural consequences of his acts, and it is sufficient that the wrongful or fraudulent act will necessarily injure or defraud the bank.

Agnew v. U. S., 165 U. S. 36;
U. S. v. Youtsey, 91 Fed. 864;
U. S. v. Allis, 73 Fed. 165;
Peters v. U. S., 94 Fed. 127;
U. S. v. Kenney, 90 Fed. 257;
U. S. v. Taintnor, 28 Fed. Cas. No. 16428;
Chadwick v. U. S., 141 Fed. 225, 242.

Proof of the act charged raises the inference of intent to injure or defraud the bank or to deceive and throws the burden of proof upon the defendant.

U. S. v. German, 115 Fed. 987.

Where false entries have a natural tendency to deceive the bank officers, the presumption of such intent cannot be rebutted by a denial thereof by the defendant:

U. S. v. Means, 42 Fed. 599.

How could intent be proven except by showing that the defendant knowingly performed certain acts the usual and ordinary results of which are deleterious, and deducing or presuming from such facts a criminal intent? No one can look into another's mind and read there the intent. The instruction is correct.

11. (Br. p. 48, l. 18 to p. 49, l. 22.) The instructions are right. Same authorities as in No. 10 above.

12. (Br. p. 49, l. 23 to p 5.0, l. 23.) The objection of counsel to this instruction is based upon the erroneous idea that an intent to injure and defraud the bank is necessary under section 5209. As explained above, the intent necessary for the violation of this act under the counts mentioned in the instruction was the intent to deceive the officers of the bank or the agent of the comptroller. It is not necessary that there be an intent to defraud. See authorities above cited.

13. (Br. p. 50, l. 24 to p. 53, l. 2.) There is "much cry and little wool" in the objections of counsel to this instruction. The testimony shows that Williams instructed the general bookkeeper that he had made a loan for M. B. Murphy and if any checks came in against Murphy's account Ingram was to see Williams first, that is, before the checks were refused payment because Murphy had not sufficient funds in the bank. In order to obey these instructions and to prevent the turning down of a check of Murphy's for this reason Ingram noted on the ledger sheet the words, "See Ingram in case of check." It is true, perhaps, that Williams did not tell Ingram to make the notation, but he did instruct him not to turn any checks down without first seeing him. If there is a slight inaccuracy in the statement of the court it is not prejudicial and the counsel for appellant did not take any exception thereto at the time.

14. (Br. p. 53, ll. 3 to 26.) The offered instruction, insofar as it correctly states the law, is covered by the instructions given by the court.

15. (Br. p. 53, l. 27 to p. 54, l. 23.) The court instructed the jury fully and correctly in regard to false entries and the point made by counsel, insofar as it correctly states the law, was fully covered.

16. (Br. p. 54, l. 24 to p. 55, l. 27.) The proposed instructions here set forth were fully covered in the instructions of the court insofar as they properly state the law.

17. (Br. p. 55, l. 28 to p. 56, l. 27.) We deny that there is any error prejudicial or otherwise in the comments of the court upon the evidence, and we deny that the comments of the judge are other than judicial and dispassionate. The jury was informed that they were the sole judges of the facts and of the weight and effect of the evidence, and there is no error in the record in this regard.

VII.

The Motion for New Trial and in Arrest of Judgment

1. The granting of a new trial is within the discretion of the trial court, and where there is evidence to support the verdict the denial of the motion is not reviewable on error:

Shepard v. U. S., 236 Fed. 73, 77;
Segna v. U. S. 218 Fed. 791, 792;
Collins v. U. S., 219 Fed. 670, 674:
Blitz v. U. S., 153 U. S. 312.

2. (Br. p. 57, ll. 3 to 13.) If the statement by the prosecuting attorney was error at all it was prejudicial to the Government and not to the defendant. The jurors were citizens of San Diego county and if the statement was an imputation such imputation was to the very jurors themselves. There could be no prejudice to the defendant by this remark.

3. (Br. p. 57, l. 17 to p. 58, l. 22.) In the case of Caminetti v. United States, 242 U. S. 470, 494, sustaining the Circuit Court of Appeals for the Ninth Circuit, the court said:

> "We think the better reason supports the view sustained in the Court of Appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it."

This decision was rendered in sustaining an instruction of the court, to the following effect:

> "A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so, no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness stand and testify, he then

> subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

This court made an exhaustive review of the authorities in deciding this case (Diggs, Caminetti v. U. S., 220 Fed. 545, 548 *et seq.*) and the prosecutor had these cases in view when making the comments complained of.

4. (Br. p. 58, l. 22 to p. 62, l. 11.) The court instructed the jury that they were to determine the case upon the evidence introduced before them by the witnesses and not upon statements of counsel. If there were erroneous statements by the prosecuting attorney they would be cured by the instructions:

Holt v. U. S., 218 U. S. 245, 250.

The record discloses that at the time of the colloquy complained of the court was busy writing and did not hear what was said by counsel. When his attention was called no statement was made to him of what had been said, no request was made for an instruction to the jury to disregard the statements, and the court did not rule upon the question for this reason. No

exception was taken. No error can be predicated upon such a record.

Diggs v. U. S. 220 Fed. 545, 554.

5. (Br. p. 62, l. 12 to p. 63, l. 31.) These are the same matters referred to in the previous number (4) and the same authority disposes of them.

6. (Br. p. 64, l. 1 to p. 66, l. 22.) There is no prejudicial error shown in any of these matters. Counsel and prisoner were both present at the time that the custodians of the jury were sworn to take charge of the jury and they were familiar with the former proceedings and with the testimony of the custodians in regard to their knowledge of the case, and no objection was made to these men as custodians, and no objection was made at any time to them acting as custodians until long after the verdict, at the time of the motion for a new trial. The court below believed that there was no prejudice resulted to the defendant and so held.

In the case of Holt v. United States, *supra*, at page 250, the court held as follows:

> "We will take up in this connection another matter not excepted to, but made one of the grounds for demanding a new trial, and also some of its alleged consequences, because they also involve the question how far the jury lawfully may be trusted to do their duty when the judge is satisfied that they are worthy of the trust. The jurymen were allowed to separate during the trial,

always being cautioned by the judge to refrain from talking about the case with anyone, and to avoid receiving any impression as to the merits except from the proceedings of the court. The counsel for the prisoner filed his own affidavit that members of the jury had stated to him that they had read the Seattle daily papers with articles on the case, while the trial was going on. He set forth articles contained in those papers, and moved for a new trial. The court refused to receive counter-affidavits, but, assuming in favor of the prisoner that the jurors had read the articles, he denied the motion. This court could not make that assumption if the result would be to order a new trial, but the probability that jurors, if allowed to separate, will see something of the public prints, is so obvious, that, for the purpose of passing on the permission to separate, it may be assumed that they did so in this case * * *. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain a jury trial under the conditions of the present day."

7. (Br. p. 66, l. 23 to p. 74, l. 5.) This court will not consider the sufficiency of the evidence to sustain the verdict.

"The alleged fact that the verdict was against the weight of evidence we are precluded from considering if there was any evidence proper to go to the jury in support of the verdict. Crumpton v. United States, 138 U. S. 361; Moore v. United States, 150 U. S. 57, 61."

Humes v. U. S., 170 U. S. 210, 213;

Tapack v. U. S. 220 Fed. 445, 448.

VIII.

Conclusion.

In considering this case and the very great number of objections that have been raised to the sufficiency of the indictment it is well to keep in mind the fact that the sentence of the defendant was for five years upon each of the counts upon which he was convicted, the said time to run upon all of said counts concurrently; so that his sentence is not longer than might have been given him upon conviction on a single count. It is the well-settled law that if any count of the indictment is good, under the circumstances as above suggested, the sentence will stand:

Claasen v. U. S., 142 U. S. 140;
Flickinger v. U. S., 150 Fed. 1, 2;
Aczel v. U. S., 232 Fed. 652.

Where sentence imposed on a defendant convicted on a number of counts was no greater than might have been imposed on any single count, if he was properly convicted of one of the offenses charged, error with respect to the others is not ground for reversal.

Baird v. U. S. 196 Fed. 778.

This applies to the instructions.

Morse v. U. S., 174 Fed. 539;
Certorari denied, 215 U. S. 605;
Hartman v. U. S., 168 Fed. 30;
Goll v. U. S., 151 Fed. 412.

The appellant had a most fair and impartial trial. It was in his home town, among his personal friends, and some of his personal friends were members of the jury which tried him. The prosecution, after exhausting its peremptory challenges, challenged one of the jurors who testified that he was a personal friend and neighbor of appellant, living very near him for many years, for favor. But the court disallowed the challenge, and the prosecution had to proceed with this juror in the panel, prejudiced in appellant's favor and with the distaste for the prosecution that such a challenge would naturally create. Appellant was defended by the counsel of his choice. The court was a personal acquaintance of appellant whose feeling for appellant is aptly shown in the brief, page 73, line 24 to page 74, line 1. Appellant had every opportunity to clear himself from these charges if they were false. In spite of all these advantages, the testimony of guilt adduced was so overwhelming that he was convicted upon nine of the counts. There is no prejudicial error in the record. The judgment should be affirmed.

Respectfully submitted,

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Wm. Fleet Palmer,

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